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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT ZONA GRAHAM, ADMINISTRATRIX', BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

Terminal was lessor and Frisco lessee of certain tracks in Terminal yards in Kansas City, Missouri. Graham, a

switchman for Terminal then engaged in its interstate commerce, was struck and killed by Frisco train using such leased facilities. His widow brought suit against both Terminal and Frisco under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and recovered judgment against both. Upon appeal the Supreme Court of Missouri affirmed judgment as against Terminal but reversed as to Frisco (R. 432/445). Terminal now seeks a writ of certiorari to review that judgment.

The position of this respondent in opposing the petition for writ of certiorari should be made clear. Throughout the course of this case, as shown by her petition, she claimed that the Terminal, as lessor of the tracks upon which the Frisco train was being operated at the time of Graham's death, was liable for any negligence of the Frisco, its lessee (Tr. 48, 262/3). She also claimed that the Frisco (although not the general employer of Graham) was liable under the Federal Act because at the time of his death Graham was engaged in interstate commerce "for both defendants" (Tr. 5).

In this position she was substantially joined by the Terminal although that defendant strongly asserted throughout that she had not made a submissible case of negligence against the lessee, the Frisco, and therefore it, the lessor, could not be held liable (Tr. 26/7-221/2-259/60-340/1). The Frisco on the other hand always claimed that no liability existed as to it since no negligence was shown, Graham was not its servant, and was not engaged in its interstate business at the time of his death (Tr. 219/20-256/7-333).

In the opinion of the Supreme Court of Missouri now sought to be reviewed (Tr. 432/445) that court *en banc* unanimously held that the Terminal was liable for its lessee's negligence (held to have been shown), but held that

the Frisco was not liable for the reason that no conventional relationship of master and servant existed between it and the deceased and he was not engaged in interstate business on its behalf at the time of his death (Tr. 434/438).

This respondent does not disagree with the result reached by the Supreme Court of Missouri in affirming the judgment against the Terminal. Terminal seeks to attack the opinion upon the ground that if the Missouri Lessor-Lessee Statute (Sec. 5163, R. S. Mo., 1939) is inapplicable to create the necessary conventional relationship of master and servant by operation of law as between the deceased and Frisco, it necessarily must also be inapplicable to charge the Terminal with the negligence of its lessee, the Frisco.

With this position of Terminal here the respondent Graham strongly disagrees. No such strained result follows from the court's opinion below. If any such issue were now in this case it would be unavailable to Terminal here upon certiorari.

That, briefly, is the position of respondent Graham in this proceeding. Additional facts necessary to support this position will be hereinafter referred to where appropriate.

SUMMARY OF ARGUMENT.

The writ of certiorari herein should be denied for the following reasons:

First, because no federal question now claimed to be the basis for this court's jurisdiction was presented in the Missouri Supreme Court by petitioner until its Motion for Rehearing, which Motion was overruled without opinion;

Second, the Missouri Supreme Court did not pass upon any federal question in its decision as to Terminal's liability but ruled that point upon previous admissions and the trial and appeal theory of Terminal to which it was held bound and committed;

Third, the decision of the Missouri Supreme Court as to the Terminal's liability is not in conflict with any decision of this court or any previous decisions of the Missouri Supreme Court or courts of last resort of other jurisdictions;

Fourth, the correct judgment as to the Terminal's liability herein was rendered by the Supreme Court of Missouri and would be affirmed by this court upon certiorari;

Fifth, the decision of the Missouri Supreme Court as to the non-liability of Frisco furnishes no ground for Terminal's request for writ of certiorari.

ARGUMENT.

I.

The Writ of Certiorari Should Be Denied for the Reasons That the Petitioner, Terminal, Did Not Properly Assert a Federal Question for Determination Below, the Decision of the Supreme Court of Missouri Was Not Based upon a Federal Question and Its Decision Is Not in Conflict with Controlling Decisions of This Court.

Petitioner seeks to invoke the jurisdiction of this court under the terms of 28 U. S. C., Sec. 344 (a) and (b) (Pet. p. 7). In the Conclusion of its brief it claims that it has been deprived of its rights under the Federal Employers' Liability Act (Pet. p. 38). The argument to support this view seems to be that the Missouri Supreme Court erroneously held the Terminal liable under the act although it was itself not negligent.

The applicable provision of the jurisdictional statute is as follows (28 U. S. C., Sec. 344 (b)):

> "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State * * * where any title, right, privilege or immunity is specially set up or claimed by either party under * * * any * * * statute of * * * the United States; * * *."

The Rules of this court contain the following added provision (Rule 38 (5) U. S. Supreme Court, 28 U. S. C. A. Pocket Part, p. 163):

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

This case does not come within the purview of either the statute or rule.

A.

Any Federal Question Which May Have Been in This Case Was First Presented by the Petitioner on Motion for Rehearing Before the Missouri State Supreme Court and Was Therefore Too Late.

The record in this case clearly shows that the alleged federal question which petitioner claims as the basis for the exercise of this court's jurisdiction is that it has been deprived of its rights under the Federal Employers' Liability Act in that the Missouri Supreme Court has held it liable under that act where no negligence was alleged or proved against it. Petitioner asserts that the plaintiff below was thus relieved of the requirement of the Federal Act requiring proof of negligence and it was deprived of its right to require such proof. Whether or not this is a valid federal question sufficient to invoke the jurisdiction of this court is not necessary for determination here. This for the reason that the petitioner did not raise this point until its Motion for Rehearing after final decision of the Missouri Supreme Court herein (Tr. 455-471 incl.). Prior to that time in the long history of this litigation, the Terminal took the position that it was liable for the negligence of its lessee, the Frisco, under the Federal Em-

ployers' Liability Act; that the lessee Frisco was also liable under such act, but that no negligence had been proved and no submissible case of negligence made. In its brief filed in the Supreme Court before final decision this position was taken by petitioner (Tr. 406-413). After submission of this case originally in Division Two of the Supreme Court of Missouri, which Division affirmed the judgment as against both Terminal and Frisco (Tr. 355-363 incl.), the Terminal's Motion for Rehearing and Suggestions in Support thereof (Tr. 360-378 incl.) were direct attacks upon that decision upon the basis that no negligence had been proved and no submissible case made. Not one word was said therein by the Terminal about its present theory.

After the first decision of the Missouri Supreme Court *en banc* plaintiff filed a Motion for Rehearing (Tr. 402-430 incl.). No suggestions were filed in opposition to this Motion for Rehearing by either Terminal or Frisco. The rehearing was granted and the case reargued and resubmitted and the present opinion, now sought to be reviewed, was rendered (Tr. 432-435 incl.).

The present theory of the Terminal was raised thereafter for the first time in its Motion for Rehearing, but even in that the Terminal took the position as follows (Tr. 457-458):

> "We have always maintained that by virtue of the statute the deceased was a joint employee of both appellants and if Frisco was negligent both appellants were *jointly liable* under the Federal Act" (Italics ours).

This Motion for Rehearing was overruled by the Supreme Court *en banc* without opinion (Tr. 426).

It thus appears that the petitioner's present position and theory, that it is being deprived of its federal rights

because it is being held responsible for the negligence of another, was raised for the first time after final decision of the Missouri Supreme Court. *It could have been raised at any time in the proceeding because no negligence was ever charged or attempted to be proved against the Terminal.* The raising of this question by the Terminal for the first time upon Motion for Rehearing was too late to present any federal question to this court upon certiorari. This rule has been stated many times by this court. Reference is made to the case of *Herndon* v. *State of Georgia*, 295 U. S. 441, 79 L. Ed. 1530, wherein this court said:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it. *Texas & P. R. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder*, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited."

In the case of *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, this court said:

> "The surety company petitioned for a rehearing. In that petition besides reiterating several of its previous contentions it urged for the first time that the rendition of the judgment on its understanding violated the due process clause of the 14th Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same grounds of objection had been raised throughout the

proceeding but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the 14th Amendment. Cases cited."

See also, *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, 89 L. Ed. 292.

Further citation of authority upon this well-settled principle is unnecessary.

Applying this rule to the case at bar the writ should be denied since although there was ample opportunity throughout the entire course of this litigation for petitioner to raise its so-called federal question it failed to do so until after final decision of the Missouri Supreme Court in its Motion for Rehearing which was denied without opinion and came too late to present this matter upon certiorari.

B.

The Writ of Certiorari Should Be Denied Herein Because the Missouri Supreme Court in Its Decision As to the Petitioner, Terminal, Did Not Pass upon Any Federal Question.

Before this court should take jurisdiction upon application for writ of certiorari, it should clearly appear that the decision of the Missouri Supreme Court, sought to be reviewed, passed upon a federal question which deprived petitioner of federal rights. It has been pointed out under division I A of this Argument that no such federal question was in the case at the time of the decision of the Missouri Supreme Court as to this petitioner. The basis of the state court's affirmance as expressed by that court is as follows (Tr. 442):

"In the Circuit Court and here upon appeal *Terminal admitted, and it has been the theory of Terminal throughout the case*, that Graham was its em-

> ployee, that both Graham and it were engaged in interstate commerce and *that if Frisco was negligent the case was one to be submitted to the jury. Terminal committed itself to that theory and is bound by it. Weiner* v. *Mutual Life Ins. Co.*, 352 Mo. 673, 676, 179 S. W. 239. *Knorp* v. *Thompson*, 352 Mo. 44, 175 S. W. 2d 889" (Italics ours).

Terminal now claims that there was no basis for the above finding of the court with reference to its trial position and admissions. The record clearly indicates otherwise. In counsel's opening statement to the jury in the trial below, this was said (Tr. 26):

> "There is no charge and no evidence that there was any negligence so far as the Kansas City Terminal Railway is concerned in this matter. We are a defendant in this lawsuit by reason of the fact that we are the owners of the track on which this Frisco train was operating at the time that Mr. Graham met his unfortunate death."

In the early part of the trial counsel for plaintiff offered the operating agreement between the Terminal and the Frisco (Tr. 40-52 incl.) and certain parts of it were read to the jury without objection from counsel for the Terminal.

At the conclusion of the trial when instructions were offered by all parties the Terminal did not offer any instruction based upon the theory that it was not liable for the negligence of the Frisco or that the jury was required to find against both defendants (Tr. 260-301, incl.). If that trial theory had been adopted by the Terminal then the overruling of such proffered instruction would have been the basis for error upon appeal.

In the appellate court the Terminal stated its position and theory as follows (Tr. 406):

"POINTS RELIED UPON.

I.

"Deceased Graham was, under the undisputed facts, an employee of the Frisco within the meaning of the Federal Employers' Liability Act by virtue of the Missouri Lessor Statute, *so that the case was properly submitted against both defendants under the Federal Act*" (Italics ours).

In its Argument in this brief, Terminal stated (Tr. 407):

"Plaintiff's amended petition pleaded (Tr. 2) and plaintiff's main Instruction No. I (Tr. 260) submitted her case against both defendants under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*). *We contend and plaintiff contends that the submission was proper* because under the undisputed facts Graham was, at the time of his death, a joint employee of both defendants within the meaning of the Federal Act by virtue of the Missouri Lessor Statute (Sec. 5163, R. S. Mo., 1939)" (Italics ours).

(Tr. 409:)

"Upon the foregoing facts we believe that *the case was properly submitted to the jury under the Federal Act against both defendants because* Graham was a joint employee of both defendants by virtue of the Missouri Lessor Statute and was employed in the interstate commerce of both within the Federal Act."

(Tr. 410:)

"The Frisco and Terminal were both engaged in interstate commerce and Graham was so engaged for both defendants."

(Tr. 412:)

"This court and the Supreme Court of the United States have consistently sustained suits under the Federal Act by employees of *either* the lessor or lessee *against either* for injuries or death caused by the lessee's negligence. The employee of the lessee may sue the lessor for the lessee's negligence (*North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 34 S. Ct. 305), *or the employee of the lessor may sue the lessor for the lessee's negligence* (*Miller* v. *Terminal R. Assn., supra. Francis* v. *Terminal R. R. Assn.*, 193 S. W. 2d 909 (Div. 2)) * * *" (Italics ours).

In a Supplemental Brief filed by Terminal this position was taken (Tr. 413):

"SUMMARY OF TERMINAL'S POSITION.

"1. * * * The lessee's liability is by those statutes defined to be 'as in the same manner if operating its own road.' Division Two properly held that this did not mean that its liability was limited to that of an owner, but that its liability was the same as that of the lessor, when effect is given to the further provisions of the statutes *permitting suit against either the lessor or lessee or both jointly* and providing that satisfaction in full by either road shall discharge the other."

(Tr. 414:)

"We briefly analyze the cases sustaining similar suits under the Federal Act:

* * * * * * *

"*Miller* v. *Terminal R. R. Assn.*, 349 Mo. 944, 163 S. W. 2d 1034 (Div. 1). Employee of the lessor against the lessor for the negligence of the lessee.

"*Francis* v. *Terminal R. R. Assn.*, 193 S. W. 2d 909 (Div. 2). Employee of the lessor against the lessor for the negligence of the lessee.

* * * * * * *

"2. We cannot refrain from three observations respecting the Motion of the Terminal Railroad Association of St. Louis for permission to file a brief and to make an oral argument. *First, nothing is now presented to this court for decision except the liability of Frisco, the lessee, under the Federal Act upon the facts in this case.* This court is not called upon to decide and presumably will not now decide the liability of the lessor or the lessee under the Federal Act in other and different circumstances. *Second,* the question of whether Graham was or was not an employee of the Frisco is properly a matter of state law to which the United States Supreme Court will give effect in determining the coverage of the Federal Employers' Liability Act. *North Carolina R. R. Co.* v. *Zachary, supra; Chi., B. & Q. R. Co.* v. *Willard,* 220 U. S. 413, 31 S. Ct. 460. *Therefore, federal determination of the effect of Sections* 5162 *and* 5163 *is wholly unnecessary.* * * *" (Italics ours).

The above quotations clearly show the trial and appeal theory of the Terminal in this case. Certainly these admissions were sufficient basis for the Missouri Supreme Court to rule that Terminal was committed to that theory and was bound by it and that it was unnecessary for that court to pursue the matter further. That was obviously the sole basis for the decision of the Missouri Supreme Court and does not constitute a decision involving a federal question sufficient to invoke the jurisdiction of this court upon certiorari. The basis of the court's decision was found in the state law, not upon federal question.

This court has expressed itself very forcibly against accepting jurisdiction to review state decisions which do not affect federal rights. In the case of *Herb* v. *Pitcairn,* 324 U. S. 117, 89 L. Ed. 789, this court said:

"This court from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds (Cases cited). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

* * * * * * *

"* * * In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and *that its decision was essential to disposition of the case;* and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this court will not review (Cases cited)" (Italics ours).

In *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 L. Ed. 158, the court said:

"* * * The case is controlled by the settled rule that where the judgment of some State court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule has been firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635, 637, and has been reiterated in a long line of cases since that time."

Neither can this court properly accept jurisdiction where it is necessary to surmise that a federal question is involved or strain the construction of a state decision toward the conclusion that such a question is involved or where a state court has declined to consider a federal question. See *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191; *Penn. Ry. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 80 L. Ed. 796.

The fact that the Supreme Court of Missouri may have decided and ruled upon the liability of the Frisco in such a way and under such conditions as to bring into the case a Federal question as to it (with which result Terminal disagrees) is not available as a ground to be urged in this proceeding by the *Terminal*. The respondents do not here complain of that result. Respondent, Graham, is the only proper party to raise the alleged error in the result reached as to Frisco. Petitioner can complain of only such parts of the decision as were adverse to it not those parts favoring its co-defendant (whose liability is asserted by Terminal to be joint).

See: *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 L. Ed. 452; *Marine Transit Corp.* v. *Dryfus*, 284 U. S. 263, 76 L. Ed. 282.

We therefore urge that the writ of certiorari be denied because the decision of the Missouri Supreme Court affirming the judgment as to the petitioner, Terminal, did not rest upon any federal ground or question but strictly upon admissions and the trial and appellate theory of Terminal to which it became and was committed under the law of the state of Missouri.

C.

The Decision of the Missouri Supreme Court Is Not in Apparent Conflict with Any Applicable Decisions of This Court or Other Federal Decisions.

Petitioner asserts that a conflict exists between the decision of the Missouri Supreme Court and certain decisions of this court and other jurisdictions (Pet. Brief, p. 38). The declaration of this court's policy with reference to the exercise of its discretion in granting the writ upon this ground states [Rule 38 (5) (a)]:

> "Where a state court has decided a *federal question of substance* * * * in a way probably not in accord with applicable *decisions of this court.*"

We believe that we have demonstrated above that no federal question warranting the assertion of this court's jurisdiction was either properly presented by petitioner below nor decided by the Supreme Court of Missouri in its decision with reference to Terminal's liability.

However, if the alleged federal question urged by petitioner had been properly presented below the decision of the Missouri Supreme Court was not in any conflict with applicable decisions of this court. The cases relied upon by petitioner show no such conflict.

In *Dickinson* v. *Stiles,* 246 U. S. 61, 62 L. Ed. 908; *Gilvary* v. *Cuyahoga V. Ry. Co.,* 292 U. S. 57, 78 L. Ed. 1123, and *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 89 L. Ed. 1915, this court was considering cases not brought or prosecuted under the Federal Employers' Liability Act. They had in common with the cases of *C., M. & St. Paul R. Co.* v. *Coogan,* 271 U. S. 472, 70 L. Ed. 521; *Frese* v. *Chi., B. & Q. R. Co.,* 263 U. S. 1, 68 L. Ed. 151; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 29, 61 L. Ed. 1045, and *Tenant* v. *Peoria & U. R. Co.,* 321 U. S. 29, 88 L. Ed. 520 (all cases involving the Federal Employers' Liability Act), the additional distinguishing features that no lessor-lessee relationship or state law with reference to continuing liability of a railroad lessor for the negligence of its lessee were involved. Also none of the cases were ruled upon the principle that the complaining party was bound by its trial and appeal theory. These decisions are therefore inapplicable upon the facts and no conflict could or does exist between the rulings of this court therein and the decision of the Missouri Supreme Court here sought to be reviewed.

In the case of *C., B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 55 L. Ed. 521, which was a suit under the common law this court held that under the Illinois Lessor-Lessee statute both the lessor and the lessee were jointly and severally liable for the death of lessee's servant killed by the negligence of the lessee.

Following the principles of that decision but in an action under the Federal Employers' Liability Act this court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, held a lessor liable for the death of employee of the lessee caused by the negligence of lessee under North Carolina local law. The defendant (lessor) in that case was not guilty of any active negligence but was held liable for the negligence of its lessee.

In the case of *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402, following, but somewhat extending the doctrine of the *Zachary case, supra*, this court held that both the lessor and the lessee railroads were liable for injury to an employee of the lessee through the negligence of the lessee under North Carolina local law.

The cases of *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670, and *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 59 L. Ed. 849, were both suits under the Federal Employers' Liability Act but are clearly distinguishable from the opinions pronounced by this court in the *Willard, Zachary* and *Lloyd cases, supra.*

In the Hull case this court held that the licensor was not liable for the death of an employee of the licensee, killed by the negligence of the licensor, since there was no dominant rule of local law of continuing liability on the part of the licensor.

In the Robinson case an employee of the Pullman Company injured by the negligence of the defendant

sought to recover against the defendant upon a private contract between it and the Pullman Company. This court held that he was not an employee of the Baltimore and Ohio, there was no lease involved and no local law of continuing liability.

The decision of the Supreme Court of Missouri is, therefore, not in any apparent conflict with the decisions of this court relied upon by petitioner. In fact the Willard, Zachary and Lloyd cases support the theory of the Missouri Supreme Court that where local law prevents the lessors of railroads from escaping responsibility for the negligence of their lessees, suit can be brought against such lessors who are not negligent.

We therefore urge upon this point that the writ of certiorari be denied because the decision of the Supreme Court of Missouri is in accord with, and not in conflict with, applicable decisions of this court.

D.

The Decision of the Missouri Supreme Court Is Not in Conflict with Previous Decisions of That Court or Other State Courts of Last Resort.

Although it is probably not a sufficient ground for the exercise of this court's discretion in granting a writ of certiorari, petitioner claims that the decision of the Missouri Supreme Court holding it as lessor liable for its lessee's negligence under its trial and appellate theory is in conflict with other decisions of that court and of courts of last resort of other state jurisdictions. Such is not the case. For example:

In the cases of *Francis* v. *Terminal R. R. Assn.*, 354 Mo. 1232, 193 S. W. 2d 909, and *Miller* v. *Terminal R. Assn.*, 349 Mo. 944, 163 S. W. 2d 1034, which were both

suits under the Federal Employers' Liability Act, the former involving the Missouri Lessor-Lessee statute, and the latter involving the Illinois statute, the court held the lessor liable to its employee injured by the lessee's negligence.

In the case of *Smith* v. *Thompson,* 182 S. W. 2d 63, The Supreme Court of Missouri held both the lessor and the lessee liable for the death of an employee of the lessee by reason of the joint negligence of the lessor and the lessee.

In the cases of *Clark* v. *A., T. & Santa Fe R. Co.,* 319 Mo. 865, 6 S. W. 2d 954, and *Fleming* v. *La. & M. R. Co.,* 263 Mo. 180, 172 S. W. 355, the Missouri Supreme Court, in common law actions involving the rights of third persons, held both the lessee and the lessor liable for the lessee's negligence.

In the case of *Spaw* v. *K. C. Terminal Ry. Co.,* 198 Mo. App. 552, 201 S. W. 927, the Kansas City Court of Appeals, in a suit brought under the Federal Employers' Liability Act, held both the lessor and the lessee liable for the lessee's negligence.

It is therefore apparent that the decision in the case at bar holding the lessor liable for the negligence of the lessee under the Missouri statute and under its trial and appeal admissions and theory is in no wise in conflict with any previous decisions of that court.

In the case of *Armstrong* v. *Chi. & I. R. Co.,* 350 Ill. 426, 183 N. E. 478, the lessor and lessee were both held liable for the lessee's negligence resulting in injury to an employee of the lessee, and in *Wilson* v. *Terminal R. Assn.,* 333 Ill. App. 256, 77 N. E. 2d 429, the lessor was held liable to an employee of the lessee for the negligence of the lessor. Both of these cases involved the Illinois Les-

sor-Lessee statute almost identical in terms with the Missouri statute.

In the case of *Barnes* v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724, an employee of the lessor was allowed to recover against the lessor for lessee's negligence. A Federal Employers' Liability case.

In the case of *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003, 239 U. S. 496, 60 L. Ed. 402, in a suit under the Federal Employers' Liability Act, an employee of the lessor injured by the negligence of the lessee was allowed to recover against both the lessor and the lessee, and in *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, an employee of the lessee injured by reason of the negligence of the lessee was allowed to recover against the lessor. In both of these cases the local law of North Carolina fixing the liability of the lessor railroad for the negligence of its lessee was involved.

The decision of the Missouri Supreme Court holding the lessor responsible for the negligence of its lessee, the Frisco, under the Missouri statute and the admissions and theory of petitioner in the trial and appeal of the case is, therefore, not in conflict with any decisions of courts of last resort in other jurisdictions.

II.

The Decision of the Missouri Supreme Court Holding the Terminal Liable for the Negligence of Frisco Is the Only Result Which Could Ever Be Reached in This Case As to Its Liability and This Court Should Not Grant Certiorari to Review Such Finding.

Even absent the trial and appellate theory and admissions of petitioner that it was responsible for the negli-

gence of its lessee, Frisco, such responsibility is fixed by all the statutory and common law rules applicable to this case both state and federal, and no other result could ever be reached as to the Terminal's responsibility in this case.

It is not the policy of this court to accept jurisdiction upon certiorari of cases to revise, rewrite or modify state court opinions where the end result would be the same.

In *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, the rule was stated thus:

> "* * * Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State court after we corrected its views of the Federal laws, our review could amount to nothing more than an advisory opinion * * *."

All elements to support an affirmance of the judgment against the Terminal under the Federal Employers' Liability Act are present in this case, namely:

(1). The conventional relationship of master and servant existed between Terminal and deceased.

(2). Deceased was engaged in interstate commerce on behalf of Terminal at the time of his death, and

(3). Deceased was injured and killed as a direct result of the negligence of Terminal's lessee or agent.

Upon reconsideration or rehearing the judgment against it would be affirmed.

A.

Terminal Is Liable for the Negligence of Its Lessee Both under the State and Federal Law.

We believe that the cases cited and discussed under Point I of this brief conclusively demonstrate that in those states which have common law rules or statutes declarative of the common law principle that railroads cannot escape their charter responsibilities by lease or license of their facilities but are and remain liable for the negligence of their lessee or licensee, that the liabilities thus fixed upon such roads may be enforced in an action under the Federal Employers' Liability Act.

Indeed Terminal concedes that rule in its brief filed herein by saying (Petitioner's Brief, p. 37):

> "Petitioner has always claimed—and now claims —that Graham was a joint employee of both carriers, and has always conceded—and now concedes—that if so, *and if Frisco was negligent Terminal is also liable to plaintiff, although it was not itself negligent, because of the state statute* * * *" (Italics ours).

Clearly the Terminal is liable for the negligence of its agents. The Federal Employers' Liability Act reads in part as follows (45 U. S. C. A., Sec. 51):

> "Every common carrier by railroad * * * shall be liable in damages * * * for such injury or death *resulting* in whole or in part *from the negligence of any of the * * * agents * * * of such carrier * * *"* (Italics ours).

The Frisco was an "agent" of the Terminal by reason of the state law. We need not speculate about this for this court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, confronted with this precise situation with reference to the relationship of the railroads said (l. c. U. S. 258):

"* * * Such a lease—certainly so far as concerns the rights of third parties, including employees as well as patrons—*constitutes the lessee as the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible*" (Italics ours).

A clearer definition of the relationship arising from the lease of railroad facilities cannot be found. Principals and agents need not be sued jointly for the negligence of the agent and recovery may be had against a principal, not negligent, based upon the negligence of his agent. The same general rule applies under the Federal Employers' Liability Act cases as to lessor and lessee. No other sound decision could be reached in this case other than that the Terminal was liable for the Frisco's negligence. The writ of certiorari should therefore be denied.

B.

The Problem of Whether or Not the Terminal As Lessor Was Liable for the Negligence of Frisco Its Lessee Was Properly One for Determination of the Supreme Court of Missouri under State Laws and Having So Decided This Court Would Give Effect to Its Decision.

The points in this case (1) as to whether or not Terminal was liable for Frisco's negligence and (2) whether Graham was an employee of Frisco were proper questions for determination of the Supreme Court of Missouri under applicable state law. That court has determined those points in a manner (as previously demonstrated) not in conflict with its prior decisions nor any decisions of this court. It held (1) That Terminal was liable for Frisco's negligence under the provisions of the Missouri lessor-lessee statute and (2) that Graham was not an employee of Frisco since he was not engaged in its business at the time of his death.

Upon reconsideration, having regard for the rule of *stare decisis*, that court would reach the same results. They are not questions for this court upon certiorari. Petitioner has so admitted when it said in its Supplemental Brief (Tr. 414):

> "* * * The question whether Graham was or was not an employee of the Frisco is properly a matter of State law to which the United States Supreme Court will give effect in determining the coverage of the Federal Employers' Liability Act. *North Carolina R. R. Co.* v. *Zachary, supra; Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 31 S. Ct. 460. *Therefore, federal determination of the effect of Sections* 5162 *and* 5163 *is wholly unnecessary*" (Italics ours).

This court held in the *Zachary case, supra*, that whether or not the lessor was responsible for the negligence of the lessee resulting in injury to the servant of the lessee was a matter for state determination. *Neither negligence nor conventional employment were shown in that case* (*North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 34 S. Ct. 305).

This court in *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 55 L. Ed. 527, also adhered to that rule in a case involving the Illinois lessor-lessee statute where the lessor sought to avoid responsibility for the negligence of its lessee upon the grounds that it had, by the lease, lost control of its road and operations, said (l. c. U. S. 421):

> "* * * A complete answer to this suggestion is that by the settled law of Illinois at the time the injury in question was received the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that State in the exercise of its governmental powers to say that one of its own

corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease."

The court there went on to point out that the injured party could sue the lessor and lessee jointly or severally at his option under the Illinois law.

The Supreme Court of Missouri, therefore, in holding the Terminal liable for the negligence of the Frisco under Missouri law was exercising the power recognized by this court to determine that matter. The writ of certiorari should therefore be denied.

C.

Terminal Concedes Joint Liability for the Death of Graham and Therefore Respondent Graham Had the Option to Sue Either Terminal or Frisco Separately or Both Jointly at Her Option and Recovery Against Terminal in This Suit Should Not Be Disturbed.

This is concededly a negligence case. It clearly appears that Terminal even now concedes joint, as opposed to single, liability for Frisco's negligence. It is thus in the position of a joint tort feasor against whom plaintiff can file alone or jointly, although but one satisfaction of any judgment could be obtained. *The right of reimbursement or contribution between these railroads is not presently the concern of this or any other court.*

While joint tort feasors in the conventional sense are both negligent and their negligence contributes to cause the injury, where there is a joint liability the fact that one of the wrong-doers may not for some reason be held accountable does not operate to exempt the other. This rule is stated in 62 C. J., Torts, Sec. 49, page 1136, as follows:

> "When the liability is joint, each wrong-doer is responsible for the entire damage sustained, and the fact that one of the wrong-doers may not be held accountable to the injured party will not operate to exempt the other."

There is abundant Missouri authority in conformity with this general rule. In *Berry* v. *K. C. Public Service Co.*, 341 Mo. 658, 108 S. W. 2d 98, the Supreme Court said (l. c. S. W. 102):

> "The right to sue two or more alleged joint tort-feasors jointly or singly in one or more actions, is solely with plaintiff."

Again in the case of *Stith* v. *J. J. Newberry Co.*, 336 Mo. 467, 79 S. W. 2d 447, the Missouri Supreme Court applied this rule to a suit for personal injuries brought originally against the company and its manager, Johnson. The trial court sustained a demurrer to the evidence as to Johnson and upon appeal the court said (l. c. S. W. 462):

> "* * * As any one of the tort-feasors may be sued singly or in connection with any other tort-feasor, the defendant can never object that another tort-feasor was not sued or that the case had been dismissed against him. * * * If therefore the record here sufficiently, though defectively shows a non-suit or dismissal as to defendant Johnson, what right has defendant Newberry company to complain?"

See also: *Taylor Water Co.* v. *Dillard*, 29 S. W. 662, 9 Tex. Civ. App. 667. *Rice* v. *Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

Likewise, the contractual relationship such as existed between the Terminal and the Frisco here can give rise to joint liability for negligence of one or the other (62 C. J., Torts, Sec. 46, p. 1135):

> "Persons may be jointly liable for the commission of a tort by reason of a contractual relation existing between them. Thus, by reason of their contractual relation such persons may be jointly liable as * * * principal and agent * * *."

We have previously pointed out that the Frisco occupied the position of agent for the Terminal, certainly it cannot be denied that they were both jointly interested in the operation of the Terminal facilities with reference to the Frisco train. In fact the evidence showed that the Frisco was a part owner of the Terminal. Therefore, under the general law the Terminal would be responsible for the negligence of the Frisco. The rule has been thus stated, 45 C. J., Negligence, Sec. 476, p. 897:

> "* * * Where two persons have entered upon a single understanding together, both are liable for an injury resulting from the negligence of one carrying it out."

This court in the case of *Chi., B. & Q. R. Co.* v. *Willard,* 220 U. S. 413, 55 L. Ed. 527, in discussing the joint liability which arose between a lessor and lessee railroad under the Illinois statute said (l. c. U. S. 424):

> "It is thus made clear that if the plaintiff had any cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor, lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could at the plaintiff's election be asserted against both companies in one joint action or at his election against either of them in a separate action."

The reasons given by the Supreme Court of Missouri for the reversal of the judgment as against the Frisco were not based upon the fact that the Frisco was not negligent or jointly responsible for that negligence along

with the Terminal, but solely upon the basis that no suit could be maintained against it under the Federal Employers' Liability Act because it was not the employer of Graham. It, in effect, held that the Frisco (a joint tort feasor) had a defense to the action, which was not available to the Terminal, entirely separate and apart from any matter of joint responsibility for negligence. This court has approved the doctrine that even though joint responsibility exists one of the defendants may be relieved from responsibility by reason of a defense such as a release, the bar of the statute of limitations, or some incapacity which prevents recovery against him, but which bar or defense does not extend to or protect his joint tort feasor. In the case of *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, l. c. U. S. 424:

> "In *Powers* v. *Chesapeake & Ohio R. Co.*, 169 U. S. 92, 96, 97, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking through Mr. Justice Gray, said:
>
> '* * * A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. *A separate defense may defeat a joint recovery* but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings' " (Italics ours).

The end result reached from these authorities is that there exists no right on the part of the Terminal (whose joint liability is admitted by it) either to require a joint or several suit in the beginning or to object to the relief granted by the Supreme Court of Missouri to its joint

tort feasor because of the separate and distinct defense enjoyed by it and not the petitioner. It must be assumed by this court in this proceeding that upon reconsideration the Supreme Court of Missouri would be forced to the same conclusion as to the Terminal's responsibility and, therefore, the writ of certiorari should be denied.

CONCLUSION.

This respondent, therefore, respectfully requests the court to deny the writ of certiorari for the reasons that the petitioner did not properly assert a federal question below, the decision of the Supreme Court of Missouri was not based upon a federal question, its decision was not in conflict with any controlling decisions of this court, the granting of the writ, a hearing before this court and reconsideration below would not change the results reached by the Supreme Court of Missouri as to the liability of the Terminal and this court's opinion would be in the nature of an advisory opinion with reference to state law.

Respectfully submitted,

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